

Exhibit 5

COURT REPORTERS
OF AKRON CANTON AND CLEVELAND

Transcript of the Testimony of
Robert W. Vitale

Taken On: February 20, 2008
Case Number: 2:06-CV-2141-DGC

Case: Soilworks, LLC, vs. Midwest Industrial Supply, Inc.,

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<p style="text-align: right;">33</p> <p>1 A. Again, I don't recall, but I would say he's 2 been with us between 10 and 20 years. 3 Q. And he at all times headed up the 4 information technology -- 5 A. Yes. 6 Q. -- systems? When did you first consult a 7 patent lawyer concerning the '270 and '266 8 methods and compositions? 9 A. Now, that I don't recall, but I'm sure that 10 that's in the record. 11 Q. Is that the first time you consulted a 12 patent lawyer for Midwest's methods or products? 13 A. I believe so, yes. 14 Q. And you don't remember the lawyer? Was it 15 Mr. Skeriotis? 16 MR. SKERIOTIS: Objection. 17 THE WITNESS: No. It was Joe 18 Sebolt of Sand & Sebolt. 19 BY MR. PASSARELLI: 20 Q. Is that a law firm? 21 A. It's a -- he's a patent attorney. A 22 trademark attorney. 23 Q. Where at? 24 A. Canton. 25 Q. Is he still around?</p>	<p style="text-align: right;">35</p> <p>1 names of lawyers that assisted you in 2 application/registration process of the '270 and 3 '266 patents? 4 A. No. Joe Sebolt himself, and then he had, I 5 believe, two other attorneys and I don't recall 6 their names. 7 Q. May I assume that Midwest has maintained 8 files as it relates to these patent 9 applications? 10 A. Yes. 11 Q. Do you know if those files were made 12 available to Mr. Peterson last week? 13 A. Oh, I'm sure they were, yes. 14 Q. Who were Midwest's primary competitors in 15 the dust control category at the time that this 16 patented method and composition were developed? 17 MR. SKERIOTIS: Objection. 18 THE WITNESS: You mean in broad, 19 general terms? 20 BY MR. PASSARELLI: 21 Q. Correct. 22 A. I mean there are literally hundreds. Ones 23 that we see most often are -- were/are, Syntech, 24 S-y-n-t-e-c-h, Nalco -- 25 Q. I'm sorry?</p>
<p style="text-align: right;">34</p> <p>1 A. Yes. 2 Q. So who prepared the initial application for 3 the method of chemical soil stabilization and 4 dust control that's the subject of the '270 5 patent? 6 MR. SKERIOTIS: Objection. 7 THE WITNESS: Within Midwest it 8 would have been Todd Hawkins, and within the law 9 firm it would have been -- or the firm, it would 10 be Sand & Sebolt. 11 BY MR. PASSARELLI: 12 Q. And at some point you transferred the legal 13 responsibility for the application to another 14 lawyer? 15 A. Correct. 16 MR. SKERIOTIS: Objection. 17 BY MR. PASSARELLI: 18 Q. When did you do that? 19 A. Again, I -- that I don't recall, but 20 sometime -- I just don't recall. I would have 21 to look at the file to see exactly when that 22 was. 23 Q. You would have records on that? 24 A. Yes. 25 Q. Besides Mr. Sebolt, do you recall any other</p>	<p style="text-align: right;">36</p> <p>1 A. N-a-l-c-o. I have to -- I could -- I would 2 have to compile a list of, I mean, 50 that are 3 sort of on any given day competitors that we 4 compete with, but including Soilworks. 5 Q. Have you done an analysis of Soilworks' 6 products to determine whether they infringed the 7 '266 or '270 patents? 8 MR. SKERIOTIS: Objection. 9 Attorney work product as well as some 10 attorney-client privilege. 11 If -- you can answer the question, 12 unless any information was derived during the 13 course of this litigation by us or otherwise was 14 not subject to attorney-client privileged 15 communications. 16 If, in fact, there's any test that 17 Midwest did outside of an attorney representing 18 you or being with you or in anticipation of 19 litigation, you can answer that question. 20 Otherwise I instruct you not to answer. Do you 21 understand? 22 THE WITNESS: I don't know. 23 MR. SKERIOTIS: If Midwest did a 24 test outside of preparing for litigation or in 25 anticipation of litigation or outside of me --</p>

<p style="text-align: right;">37</p> <p>1 THE WITNESS: Yeah. We did some</p> <p>2 testing in our lab.</p> <p>3 MR. SKERIOTIS: -- the lawyer --</p> <p>4 then the answer is -- then you can't answer</p> <p>5 that. But if you're testing it in the lab</p> <p>6 without anybody around --</p> <p>7 THE WITNESS: We did some testing</p> <p>8 in our lab.</p> <p>9 BY MR. PASSARELLI:</p> <p>10 Q. When did you do that?</p> <p>11 MR. SKERIOTIS: And I just want to</p> <p>12 make sure he answers correctly. The question</p> <p>13 was -- and you can repeat it and I don't want to</p> <p>14 take over, but the question was: Did you do any</p> <p>15 testing in preparation -- to determine</p> <p>16 infringement.</p> <p>17 THE WITNESS: Oh.</p> <p>18 MR. SKERIOTIS: Just make sure you</p> <p>19 understand the question.</p> <p>20 THE WITNESS: Oh.</p> <p>21 MR. SKERIOTIS: So if these lab</p> <p>22 results you did for infringement, that's okay,</p> <p>23 but make sure you understand the question.</p> <p>24 THE WITNESS: We did not do that</p> <p>25 for infringement. But that was -- again, we did</p>	<p style="text-align: right;">39</p> <p>1 Q. Did you use that evaluation in any respect</p> <p>2 in your business?</p> <p>3 A. In our business?</p> <p>4 MR. SKERIOTIS: Objection.</p> <p>5 THE WITNESS: We may have created</p> <p>6 some type of comparison document between</p> <p>7 Durasoil and our product.</p> <p>8 BY MR. PASSARELLI:</p> <p>9 Q. And our product would be what?</p> <p>10 A. EnviroKleen.</p> <p>11 Q. Do you remember if you did that?</p> <p>12 MR. SKERIOTIS: Objection.</p> <p>13 THE WITNESS: We did do that.</p> <p>14 I'm not sure what we did with it. It might have</p> <p>15 been internal.</p> <p>16 BY MR. PASSARELLI:</p> <p>17 Q. Do you know if you provided any of those</p> <p>18 evaluations to any customers or prospective</p> <p>19 customers?</p> <p>20 A. I don't recall.</p> <p>21 Q. Have you performed any evaluations to</p> <p>22 determine whether Soilworks products infringe</p> <p>23 the '270 or '266 patents?</p> <p>24 MR. SKERIOTIS: Objection. Same</p> <p>25 objection. When you say "evaluations," you're</p>
<p style="text-align: right;">38</p> <p>1 no -- I guess when Durasoil first came out we</p> <p>2 didn't know what it was other than to read what</p> <p>3 they said in their published materials.</p> <p>4 BY MR. PASSARELLI:</p> <p>5 Q. So when -- you described the product as</p> <p>6 Durasoil?</p> <p>7 A. Yes.</p> <p>8 Q. When you encountered Durasoil in the</p> <p>9 marketplace you did an evaluation of the</p> <p>10 product?</p> <p>11 MR. SKERIOTIS: Objection.</p> <p>12 THE WITNESS: Yes.</p> <p>13 BY MR. PASSARELLI:</p> <p>14 Q. Can you describe for me what you did?</p> <p>15 A. Probably testing of different types of</p> <p>16 soils to see its action or reaction, testing</p> <p>17 viscosity. Testing some physical properties</p> <p>18 like viscosity, pH.</p> <p>19 Q. Did you arrive at any conclusions as a</p> <p>20 result of that testing?</p> <p>21 A. No.</p> <p>22 Q. What was the purpose of the testing?</p> <p>23 A. Just to see what it was.</p> <p>24 Q. Did you learn anything?</p> <p>25 A. Not really, no.</p>	<p style="text-align: right;">40</p> <p>1 looking at tests, John?</p> <p>2 MR. PASSARELLI: Tests.</p> <p>3 MR. SKERIOTIS: All right. It's</p> <p>4 asked and answered and I maintain the objection.</p> <p>5 And he's already identified the one test -- the</p> <p>6 testing he did.</p> <p>7 BY MR. PASSARELLI:</p> <p>8 Q. So let me confirm for the record that</p> <p>9 the -- you understand Midwest has asserted</p> <p>10 claims of patent infringement in this case,</p> <p>11 correct?</p> <p>12 A. Yes.</p> <p>13 Q. As far as your testimony is concerned,</p> <p>14 Midwest has never performed any analysis about</p> <p>15 that infringement?</p> <p>16 MR. SKERIOTIS: Objection. Again,</p> <p>17 that's attorney work product, preparation for</p> <p>18 litigation, in anticipation thereof, and during</p> <p>19 the course of litigation as to whether or not</p> <p>20 what they did pursuant to this litigation. He's</p> <p>21 already identified the only test that they did.</p> <p>22 He's already answered that, so I'm not going to</p> <p>23 let him answer that question. So I instruct you</p> <p>24 not to answer.</p> <p>25 MR. PASSARELLI: Why don't we take a</p>